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No. 86-1217

In The
Supreme Court of the United States
October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,
Petitioners,
v.
JOSE J. OLAGUES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

This amicus curiae brief of Pacific Legal Foundation is respectfully made pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioners and respondents; these letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California

for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

The ability of the United States Attorneys to effectively investigate voter fraud in particular, and crime in general, is a great concern to Pacific Legal Foundation's members and supporters. Pacific Legal Foundation's public policy perspective and litigation experience will help provide this Court with additional arguments relevant to the erroneous holding of the Ninth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 797 F.2d 1511 (9th Cir. 1986) (en banc).

STATEMENT OF THE CASE

Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California and petitioner, David Ilchert, is the District Director of the United

States Immigration and Naturalization Service (INS) in San Francisco. In March of 1982, Russoniello received information from the Santa Clara district attorney which indicated that a number of foreign-born persons who were not United States citizens had recently registered to vote in that county. Russoniello was also told that many of these noncitizen registrants were not fluent in English and many were told by persons registering them that they were eligible to vote.

Russoniello requested that the district attorneys and voter registrars in nine counties in the San Francisco Bay Area assist him in investigating the extent of noncitizen voter registration. Specifically, he asked the voter registrars to randomly select and submit to him the names of 25 recently registered, foreign-born voters who had requested bilingual ballots. After receiving those names, he forwarded them to the INS for verification of the registrants' citizenship status. Russoniello also suggested to the district attorneys that they contact those registrants who could not be positively identified as citizens by the INS to determine whether they were citizens. He also suggested that the district attorneys seek to determine who encouraged the noncitizens, if any, to register illegally. He stated that he did not intend to prosecute any of the noncitizen registrants, but he would seriously consider prosecuting any group or individual who had deliberately conspired to register noncitizens in violation of 42 U.S.C. § 1973i(c).

The voter registrars submitted 168 names to Russoniello of which the INS determined that 55 were

citizens, 45 were not or probably were not citizens, and concerning 68, the INS had no records to help determine whether they were citizens. Russoniello conveyed the information to the district attorneys and suggested they interview any registrant who was not identified by the INS as a citizen. The interviews were by letter or other noncustodial contact. After receiving the information Russoniello ended the investigation and chose not to prosecute anyone.

Respondents, an Hispanic-American who was selected for investigation and several organizations that promote the voting of Chinese and Hispanic-Americans in the San Francisco Bay Area, filed this class action against the federal and state officials in the investigation. Respondents sought injunctive, declaratory, and monetary relief and claimed the investigation violated equal protection, substantive due process, the Voting Rights Act in 42 U.S.C. § 1973b(f)(2), and the First Amendment.

The District Court dismissed respondents' request for injunctive relief on the ground that the court has no jurisdiction to enjoin an investigation. The court also granted petitioners' motion for summary judgment on all counts. The Ninth Circuit Court of Appeals affirmed the decision and stated that the District Court did have jurisdiction but that separation of powers principles demand that a court not enjoin an investigation in the absence of extraordinary circumstances.

On a rehearing en banc in the Ninth Circuit, the court reversed in part. The court held that injunctive relief may be proper. In regard to the Equal Protection and Due Process Clauses claims, the court stated that foreign-born,

recently registered to vote, requesters of bilingual ballots formed a suspect classification. The court remanded these issues back to the District Court to determine whether the investigation pursuant to that classification was necessary. The Ninth Circuit upheld the grant of summary judgment on the Voting Rights Act because of the lack of any evidence to show that petitioners intended to deny or abridge respondents' right to vote. The court also held that damages pursuant to 42 U.S.C. § 1983 are unavailable because petitioners are entitled to good faith immunity. On the First Amendment claim, the court remanded the case back to the District Court.

Petitioners petitioned this Court for a writ of certiorari. The petition was granted on April 20, 1987.

SUMMARY OF ARGUMENT

The Ninth Circuit realized that the investigation was conducted in good faith. That fact in addition to the lack of any coercive actions in the investigations renders this case unreviewable due to separation of powers principles. Since the judiciary normally may not review a decision whether or not to prosecute, the courts have no authority to review the less intrusive decision whether or not to investigate.

Even if the judiciary could adjudicate the respondents' claims, the Ninth Circuit's creation of a new suspect class is erroneous. Language is not a suspect classification. Moreover, the decision to investigate was

based on the fact that recently registered, foreign-born requesters of bilingual ballots are more likely to be illegally registered than any other group of people, not because of any stereotypical notions which have no basis in fact. Moreover, the application of a First Amendment analysis to the investigation of organizations establishes an incentive for criminal activity to be cloaked in the protection afforded to groups. The Ninth Circuit's holding gives dangerously new meaning to the adage, "there is safety in numbers."

ARGUMENT

I

FEDERAL COURTS DO NOT HAVE AUTHORITY TO ENJOIN A PREINDICTMENT CRIMINAL INVESTIGATION BY UNITED STATES ATTORNEYS IN THE ABSENCE OF EVIDENCE OF BAD FAITH OR COERCIVE TACTICS

Far beyond dispute is the truth that the Constitution divides the federal government into three separate branches, the legislative, executive, and judicial, and was intended to do so. *See Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 951 (1983). Even though the branches are not "hermetically sealed," interference by one branch into the affairs of another should be rarely indulged. *Buckley v. Valeo,* 424 U.S. 1, 121 (1976). The purpose of the separation of powers grew out of the political theory that diffused government power provides better security for liberty than centralized power. *See*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted in Bowsher v. Synar*, — U.S. —, 92 L. Ed. 2d 583, 593 (1986).

The evil of interference by the Legislature into the operations of the executive branch recognized in *Chadha* and *Bowsher* is no more significant than an intrusion by the judiciary into either of the other two branches. Article III of the Constitution which outlines the judicial power of federal courts does not contemplate judicial supervision of everyday operations of the executive branch. Indeed, many executive branch functions are unreviewable. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979) (Rehnquist, J., concurring) (presidential abrogation of a treaty); *Ex parte Grossman*, 267 U.S. 87 (1925) (courts cannot inquire into the rationale for a presidential pardon); *Keim v. United States*, 177 U.S. 293 (1900) (appointment of executive officials); *Monarch Insurance Company of Ohio v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974) (decision to use troops to quell civil disorder); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (operations of the Central Intelligence Agency); *Velvel v. Johnson*, 287 F. Supp. 846 (D.C. Kan. 1968), *aff'd*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (participation in Vietnam War without congressional declaration); *Ex parte Hitz*, 111 U.S. 766 (1984) (status of person as foreign representative); *United States v. Klintock*, 5 U.S. (5 Wheat.) 144 (1820) (recognition of foreign governments); *United States v. Holliday*, 3 U.S. (3 Wall.) 407 (1852) (status of Indian tribes); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) (duration of hostilities).

Investigations by the United States Attorney which are within the scope of the authority of that office are actions of the executive branch. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder,* 442 U.S. 114, 124 (1979). *See also Bordenkicher v. Hayes,* 434 U.S. 357, 364 (1978); *Linda R. S. v. Richard D.,* 410 U.S. 614, 619 (1973). The protection of prosecutorial discretion from judicial interference exists because of the prosecutor's position in the executive branch. *United States v. Nixon,* 418 U.S. 683, 693 (1974). Since the decision whether to prosecute is unreviewable, the decision whether to investigate, a subordinate function in both time and intrusiveness, is generally unreviewable as well.[1]

In *Laird v. Tatum,* 408 U.S. 1 (1972), plaintiffs challenged the Army's surveillance and intelligence gathering of civilian political activities. This Court rejected the

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[1] The Ninth Circuit's citation of *Jett v. Castaneda,* 578 F.2d 842, 845 (9th Cir. 1978), for the proposition that a District Court has jurisdiction to enjoin illegal conduct by a prosecutor is surprising. 797 F.2d at 1519. In *Jett,* the court came to the opposite conclusion.

> "Nowhere in the Constitution or in the federal statutes has the judicial branch been given power to monitor executive investigations before a case or controversy arises. Without an indictment or other charge bringing a defendant before the court, or in the absence of a pending grand jury investigation, a district court has no general supervisory jurisdiction over the course of executive investigations." 578 F.2d at 845.

The court also noted that, although the United States Attorney has control over the investigation, many remedies are available to a defendant *after* indictment.

Court of Appeals' assumption that it could restrict the Army's activities to only those which were necessary. "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . . it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." *Id.* at 15.

However, this is not to say that prosecutors may ignore the various provisions of the Constitution in the course of an investigation. Constitutional challenges to specific coercive *methods* of investigation can and should be considered by the courts. Examples may include placing individuals in custody without the protections of the Bill of Rights or extraction of information by torture. Such methods cannot be condoned or ignored by the courts merely because of the lack of an indictment. But respondents are not challenging the methods of investigation. They challenge the decision to investigate itself.

Even the Ninth Circuit realized that the investigation was in good faith for such was the basis for its finding that the respondents cannot collect money damages against petitioners. *Olagues v. Russoniello,* 797 F.2d at 1523. Also, there is no evidence that the defendants engaged in the investigation with an intent to deny or abridge the respondents' right to vote. *Id.* at 1522. Courts must refuse to enjoin an investigation in the absence of bad faith or coercive activities. The Ninth Circuit recognized that all parties "concede that the government has a compelling interest in preventing voter registration fraud." *Id.* at 1521. The court erred by requiring that the investigation

must be proved by the government to have been "necessary." *Id.*

The requirement that an investigation be proved to be necessary is not a mere theoretical intrustion into the United States Attorneys' duties. Such a requirement will certainly hinder investigations which are by nature searches for a basis to take the official step of seeking an indictment. A vicious circle is imposed by the Ninth Circuit if the prosecutor must justify and establish necessity prior to the initiation of an investigation. The result is that United States Attorneys must wait for someone else to conduct an investigation to bring to light the facts which demonstrate that further investigation is necessary or the seeking of an indictment should ensue. The federal courts were never intended to be monitors of every decision of the executive branch.

II

THE PETITIONERS DID NOT CLASSIFY PEOPLE ON THE BASIS OF A SUSPECT CLASSIFICATION

The Ninth Circuit held that the "three characteristics, *i.e.*, foreign-born voter, recently registered voter, and bilingual ballot voter taken together in the instant case form a suspect classification based on race and national origin." 797 F.2d at 1521. This holding is erroneous.

In its attempt to create this new suspect classification, the Ninth Circuit rushes too quickly through its own analysis. The court stated that the "traditional indicia of a suspect classification is whether the class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* at 1520 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Court also quotes 42 U.S.C. § 1973b(f)(i) which requires bilingual ballots. Thus, it appears that non-English speaking people are not politically powerless since Congress has enacted legislation designed specifically to protect their interests.

The court concludes that Chinese and Hispanics have historically been treated in a discriminatory manner. 797 F.2d at 1521 (citing *Hernandez v. Texas*, 347 U.S. 475 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). This conclusion is no different than the fact that race is a suspect classification. However, the class was not a racial class, but a narrower class composed of three elements which included language choice.

The court attempted to distinguish the many cases which hold that language does not form a suspect classification[2] by noting that those cases involved English versus non-English speaking individuals whereas this case involves a specific classification of Spanish-speaking and Chinese-speaking immigrants. 797 F.2d at 1521. All of the cases cited involved an English language preference. All of the

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2 *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (English-only social security notices do not violate Spanish-speaking claimants' rights); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (English-only civil service exams do not violate Hispanics' rights); *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (employer's English-only rule does not violate Title VII or Section 1981); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (no right to bilingual education).

cases, as the present one, involved a general burden on *all other* language speakers, but a *practical effect* of burdening a specific language group. Russoniello investigated requesters of bilingual ballots, not Spanish and Chinese speaking individuals. The "burden" was on requesters of any non-English ballots, but incidentally the only non-English ballots were in Spanish and Chinese. There is no evidence of any animus against Chinese or Spanish-speaking people. If ballots were printed in Russian, Polish, French, German, or Bantu, there is no reason to suspect that requesters of those ballots would be treated any differently than the respondents.

The court also notes immutability as a factor demonstrating a suspect classification. 797 F.2d at 1520. But it fails to note that the classification in this case is not immutable. Members of the "classification" can cease to be members by using English ballots and no longer requesting bilingual ballots. The burden to withdraw from the class by this method may be difficult, but not impossible. More importantly, people also cease to be members of the class by simple operation of time. Only *recently registered* voters are members of the class. People are members of the class for only a short period of time.

Moreover, even if the classification were based on race, the investigation is not necessarily suspect. The Equal Protection Clause does not demand " 'things which are different in fact . . . to be treated in law as though they were the same.' " *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Men and women can be treated differently by statutory rape laws because women in fact suffer different consequences of the prohibited activity. *See Michael M. v.*

Superior Court, 450 U.S. 464 (1981). The Court in *Graham v. Richardson,* 403 U.S. 365, 372 (1971), held that classifications based on alienage are inherently suspect. However, the Court also stated that a state need only a rational basis for excluding aliens from its police force and its schools' faculties. *Foley v. Connelie,* 435 U.S. 291 (1978); *Ambach v. Norwich,* 441 U.S. 68, 80 (1979). Aliens are less likely than citizens to have the necessary understanding of American government for those occupations.

These cases demonstrate that treating people differently because they are different does not raise the specter of a suspect classification. Likewise, the investigation of foreign-born requesters of bilingual ballots is different in fact. There is no possibility that native Americans were not citizens. Also, there is a greater likelihood that requesters of bilingual ballots would be confused about their right to vote than those who are fluent in English. Those who have difficulty with the English language are *in fact* more susceptible to being misled about voting than others. However, respondents would require a futile random sampling of all voters for investigation, if any investigation of voter fraud is to be done at all.

If an investigator received information that an eyewitness saw an East Indian female wearing the dress distinctive to her national origin and religion involved in a crime, a requirement that the investigation not consider race, national origin, religion, or gender unless absolutely necessary would be ridiculous. The application of the strict scrutiny test in this context makes no sense. Why should the investigator investigate everyone and ignore information which could narrow the class of people subject to the investigation? By analogy in the present case, Russoniello had information that non-English speakers

were improperly registered to vote. Even under respondents' argument Russoniello could have taken a random sampling of all voters since no classification, suspect or otherwise, would be used. Requiring that Russoniello ignore the information that people not fluent in English were illegally registered is equally ridiculous.

III

THE RESPONDENTS' FIRST AMENDMENT RIGHTS WERE NOT VIOLATED

The organizational respondents claim the investigation unconstitutionally interfered with their First Amendment rights of association and political expression. Specifically, they claim that participation in the organizations dropped off because those organizations were under investigation.

This Court has heard similar arguments before. In *Laird v. Tatum,* 408 U.S. 1, plaintiffs sought injunctive relief against the Army's surveillance of civilian political activity. Plaintiffs claimed the investigation had an unconstitutional "chilling" effect on First Amendment rights. *Id.* at 13. This Court found no judicially cognizable injury.

The Ninth Circuit attempted to distinguish *Laird* by stating that the plaintiffs in that case were not the *targets* of the investigation, as the respondents in this case were. 797 F.2d at 1523 n.11. However, this Court never stated that the *Laird* plaintiffs were not the targets. Instead, it appears this Court did not consider an investigation alone to be a judicially cognizable injury. Indeed, the dissenting opinion of Justice Douglas makes clear that "[r]espondents were targets of the Army's surveillance." *Laird v. Tatum,* 408 U.S. at 26 (Douglas, J., dissenting).

In *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030

(D.C. Cir. 1978), *cert. denied,* 440 U.S. 949 (1979), the court considered the chilling effect of the unannounced release of journalists' long distance telephone billing records to law enforcement officials. "Not every Government action that affects, has an impact on, or indeed inhibits First Amendment activity constitutes the kind of 'abridgment' condemned by the First Amendment. . . . The constrictive impact must arise from the present or future exercise, or threatened exercise of, *coercive power.*" 593 F.2d at 1052 (emphasis added). Nothing about petitioners' investigation could be considered coercive.

Respondents' argument if accepted would create a strong incentive for criminal activity to be cloaked in associational rights. The use of associations or clubs would be the criminal's favorite tool because an investigator could be forced to justify in court on a compelling state interest standard a decision to investigate merely because the target was not an individual, but a group of individuals. The crime of conspiracy becomes a shelter, not from prosecution, but from investigation. The Ninth Circuit's rule that a good faith investigation of groups of people implicates First Amendment rights would turn criminal law on its head.

If, however, there existed bad faith or some animosity to the associations as associations, an investigation with no purpose other than to "chill" the membership should be subject to review in the courts. Unlike that scenario, the present case involved a good faith investigation which may or may not have had incidental effects on the organizations' memberships. Incidental, unintended effects should not give rise to a shield from investigation.

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CONCLUSION

The Ninth Circuit's holding goes beyond the pale of the power of the judiciary over the executive branch and, as a practical matter, unnecessarily hinders the investigation of criminal activity. The fundamental principles of separation of powers demand that the judiciary not interfere with executive good faith decisions to investigate in a noncoercive manner, such as the decision challenged in the present case.

Moreover, the decision to investigate should not be subject to strict scrutiny. The investigation did not classify people on the basis of a suspect classification, but on the basis of those who were most likely to be unwilling participants in illegal activity. Furthermore, the claim of infringement of associational rights, if allowed to be maintained, creates protection for criminal activity from investigation because of a group status. Organized crime would be protected because it is an organization. Amicus therefore urges the Court to reverse the erroneous holding of the Ninth Circuit.

DATED: July, 1987.

Respectfully submitted,

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